Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

EMPIRE BLUE CROSS AND BLUE SHIELD,

Petitioner,

v.

JOHN F. BYRNES, ET AL.,

Respondents.

EMPIRE BLUE CROSS AND BLUE SHIELD,

Petitioner,

v.

IRMA M. ALICEA, ET AL.,

Respondents.

On Petition For Writs Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITION FOR WRITS OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding that the Employee Retirement Income Security Act, 29 U.S.C. §§ 1001-1461 ("ERISA"), authorizes claims that welfare plan benefits have "vested" prior to or upon retirement despite the absence of clear and express vesting language in the applicable plan documents.

2. Whether the court of appeals erred in holding that ERISA authorizes breach of fiduciary duty claims against an employer for amending a welfare plan to modify benefits or for failing to disclose that benefits could be reduced or terminated under the plan.

PARTIES TO THE PROCEEDINGS

Empire Blue Cross and Blue Shield v. Byrnes, et al.:

The following individuals were plaintiffs-appellants in the court below: John F. Byrnes, Sterling E. Cathey, William A. DeMauro, Jerrold I. Ehrlich, Michael Elkins, Beverly Glickerman, Eugene F. Harrison, Gerald Harrison, Richard G. Kunkel, Jules K. Lambek, Louis L. Levine, John F. Luczun, John F. Muldoon, Joseph G. Murphy, Harry E. Nicholsen, Ellen H. Propp, Daniel Rosenberg, Daniel G. Sanders, John L. Shurtleff, James C. Snyder, Anthony J. Truhon, John Wandzilak, Jr., and Ronald D. Zammit. In addition, Francis J. Devlin was a plaintiff in the trial court proceedings but withdrew from the action prior to the initiation of proceedings in the court below.

Empire Blue Cross and Blue Shield v. Alicea, et al.:

The following individuals were plaintiffs-appellants in the court below: Irma M. Alicea, Jack Brook, Joseph L. Cerone, Jr., Arthur English, Joseph Fleming, Anthony Heckel, Marie Morris, Ann Musto, Rose Marie O'Connor, Elaine Bailey-Pereira, James Photis, John Pirro, Henry Reynolds, Albert Ricuito, Sheila Sansoti, and Gerard Sussungham. In addition, the following individuals were plaintiffs in the trial court proceedings but did not choose to prosecute the matter on appeal: Calogera Abbruscato, Sal Autolino, Genevieve Banger, Estate of Joanna W. Blackwood, Marie Bramson, Catherine Brandoff, Erna Seals-Brown, Vincent Carlin, Vincent Cefola, Elaine Cirino, Vincent Cirino, Timothy Connors, Juanita R. Evelyn, Jeanette Graves, Eustace Griffith, Thomas Hughey, Elaine V. Hutton, Ralph Leggett, Barbara L. McCarthy, John O. McGee, Maria Mele, John Merolla, Lula Mae Miller, Robert Novas, Cyrilla R. Palermo, Albert Pedota, Mary Purcell, Mary A. Reiday, Neville Sargeant, George Schirm, Daphne Small, Sheila Sparling,

Mary Hoffmeister-Travers, Martin Varley, John D. Vella, Howard Walsh, and Gwen Zucker.

RULE 29.6 STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Empire Blue Cross and Blue Shield, now known as Empire HealthChoice, Inc., states that it is not publicly held, it has no parent corporation, and no publicly held company owns 10% or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Empire Blue Cross and Blue Shield ("Empire") respectfully submits this petition for writs of certiorari to review the judgments of the United States Court of Appeals for the Second Circuit in these cases.[1] Review is warranted because the questions presented raise recurring issues of paramount importance regarding the proper tests for determining whether ERISA welfare plan benefits have "vested" and the extent (if any) to which employers may be held liable as ERISA "fiduciaries" for eliminating or modifying welfare plan benefits under ERISA. These questions have generated multiple circuit conflicts and arise frequently in the lower courts, and the decisions below exacerbate and sharpen these widening conflicts. This Court's review is essential to resolve the conflicts highlighted by the decisions below and to clarify this important area of the law.

OPINIONS BELOW

The opinions of the court of appeals (App., *infra*, 1a-24a (*Byrnes*), 25a-46a (*Alicea*))[2] are reported at 274 F.3d 76 and 274 F.3d 90, respectively. The opinions of the United States District Court for the Southern District of New York granting Empire's motions for summary judgment (App., *infra*, 47a-68a, 69a-82a) are not reported.

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[1] In accordance with this Court's Rules, this petition seeks review of two judgments of the United States Court of Appeals for the Second Circuit which involve "identical or closely related questions." SUP. CT. R. 12.4.

[2] Francis J. Devlin and Calogera Abbruscato, the lead plaintiffs listed in the case captions of the two opinions below, did not perfect appeals to the Second Circuit. Accordingly, respondents John F. Byrnes and Irma M. Alicea, respectively, have been designated as lead respondents for purposes of this petition.

JURISDICTION

These cases arise under ERISA, and the district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the final judgments of the district court pursuant to 28 U.S.C. § 1291. The judgments of the court of appeals were entered on December 6, 2001. The court of appeals granted Empire's motions to file its petitions for rehearing on January 14, 2002, and January 17, 2002, respectively. App., *infra*, 90a-92a, 93a-95a. On February 26, 2002, and February 27, 2002, respectively, the court of appeals denied Empire's petitions for rehearing. *Id.* at 83a-84a, 85a-86a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pursuant to this Court's Rule 14.1(f), the pertinent provisions of ERISA are set forth at App., *infra*, 87a-89a.

STATEMENT OF THE CASE

I. Statutory Background

ERISA is a "'comprehensive and reticulated statute,' the product of a decade of congressional study of the Nation's private employee benefit system." *Great-West Life & Annuity Ins. Co. v. Knudson*, 122 S. Ct. 708, 712 (2002) (citation omitted). The statute establishes a detailed regulatory scheme governing two broad categories of employee benefit plans: (1) pension plans, which provide retirement or deferred income to employees, 29 U.S.C. § 1002(2)(A); and (2) welfare plans, which provide "medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment." 29 U.S.C. § 1002(1).

In promulgating ERISA, Congress was concerned that "many employees with long years of employment [were] losing anticipated retirement benefits owing to the lack of vest-

ing provisions in [their pension] plans." 29 U.S.C. § 1001(a). ERISA therefore imposes detailed vesting rules for pension plans that specifically mandate the vesting of pension benefits. *See* 29 U.S.C. § 1053. By contrast, Congress chose *not* to require vesting of welfare plan benefits. Indeed, ERISA expressly *exempts* welfare plans from its complicated vesting provisions, leaving employers free to amend such plans at will. *See* 29 U.S.C. § 1051(1) ("[t]his part [governing, among other things, the vesting of benefits] shall apply to any employee benefit plan . . . other than . . . an employee welfare benefit plan"). As this Court has recognized, "[e]mployers . . . are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995). Thus, welfare plan benefits, including health and life insurance benefits, *do not vest* except in the rare circumstance in which an employer makes a binding extra-statutory vesting commitment in the plan documents.

ERISA imposes fiduciary obligations on employers and others that perform certain managerial and administrative tasks with respect to ERISA plans. Whether an employer has fiduciary obligations to plan participants and beneficiaries turns, not on the holding of any particular title, such as "plan administrator," but rather on the function being performed by the employer. An employer that is also an ERISA plan administrator wears "two hats" with respect to the plan, and acts in its fiduciary capacity only when it performs one or more of the "fiduciary functions" set forth in ERISA. Those functions include exercising "discretionary authority or control" over plan management and having "discretionary responsibility in . . . [plan] administration." 29 U.S.C. § 1002 (21)(A). As this Court has made clear, however, amending a welfare plan is *not* a fiduciary function under ERISA. *See Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) ("Plan sponsors who alter the terms of a plan do not fall into the category of fiduciaries.").

II. Factual Background

Respondents are former Empire employees who retired between 1989 and 1998 and are eligible for life insurance benefits under Empire's Basic Group Life Insurance Plan (the "Plan"). App., *infra*, 2a, 27a, 47a-48a, 69a.

Empire prepared and distributed to all of its employees summary plan descriptions ("SPDs") for the Plan.[3] The SPDs explained that eligible employees were entitled to life insurance benefits equivalent to two times their basic annual salary. App., *infra*, 4a-5a, 48a. With respect to post-retirement benefits, the SPDs distributed prior to 1987 stated that retirees' life insurance would remain at a level equivalent to their annual salaries for the remainder of their lives. The pre-1987 SPDs did not, however, contain any express statement that benefits would vest or that Empire was waiving its well-established right under ERISA to modify or terminate welfare benefits at will. *Id.* at 4a-5a, 54a.

In 1987, Empire revised the SPD. Like the earlier versions, the 1987 document stated that 50% of retirees' life insurance coverage would "remain[] in force for the rest of [their lives] at no cost to [them]." App., *infra*, 5a, 28a, 49a, 73a (emphases omitted). In addition, the 1987 SPD included an express reference to Empire's right to amend or terminate retirees' life insurance benefits: "The company expects and intends to continue the Plan[] . . . indefinitely, but reserves its right to end . . . the Plan[], if necessary. The company also reserves its right to amend . . . the Plan[] at any time." *Id.* at 5a-6a, 28a, 50a, 74a. Subsequent SPDs contained similar reservation-of-rights language.

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[3] ERISA entitles participants and beneficiaries to summary plan descriptions, which are easy-to-read explanations of available benefits. *See* 29 U.S.C. § 1022(a); 29 U.S.C. § 1024(b)(1).

A number of respondents retired pursuant to early retirement programs in 1992 (the Voluntary Separation Opportunity Program ("VSOP")) and 1993 (the Voluntary Incentive Program ("VIP")). The VSOP and VIP documents referred to life insurance for eligible retirees as a "lifetime" benefit, but also expressly referenced Empire's unqualified right to amend or terminate the early retirement programs and to adopt new and different programs in the future. App., *infra*, 6a-7a, 28a-30a, 58a-59a, 74a-75a.

In 1998, Empire amended the Plan to reduce respondents' life insurance benefits. App., *infra*, 7a, 30a-31a, 50a.

III. Proceedings In The District Court

Respondents filed two ERISA suits against Empire in the United States District Court for the Southern District of New York. In both cases, respondents alleged that their life insurance benefits had vested at pre-amendment levels and sought to recover those benefits under ERISA § 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). In addition, respondents alleged that Empire breached fiduciary duties under ERISA § 404(a)(1), 29 U.S.C. § 1104(a)(1), by amending the Plan in violation of its terms and by making purported misrepresentations to respondents regarding their benefits. The fiduciary duty claims purportedly arose under ERISA § 502(a)(3), which allows participants and beneficiaries in certain circumstances to sue to enjoin acts that violate ERISA or an ERISA plan.[4] The parties filed cross-motions for summary judgment, and the district court ruled in favor of Empire on all issues. App., *infra*, 47a-68a, 69a-82a.

The district court held that the reservation-of-rights language in the 1987 SPD and the VSOP and VIP documents

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[4] Respondents' complaints also contained additional claims based on the doctrine of promissory estoppel, as well as allegations that Empire violated ERISA by failing to provide plan information upon request.

was sufficient to rebut respondents' claims to vested life insurance benefits. App., *infra*, 58a-61a, 78a. In *Byrnes*, the court also rejected respondents' argument that their life insurance benefits had vested under the pre-1987 SPDs. Observing that the *Byrnes* respondents retired *after* the 1987 SPD was distributed, the court concluded that the pre-1987 SPDs did not contain "clear and express language" expressing an intent to vest employees with life insurance benefits *before* they retired, and therefore held that respondents' claims were governed by the plan documents that were in effect at the time of their retirement. *Id.* at 54a-58a.

On the fiduciary duty issue, the district court held that Empire's reduction in retiree life insurance benefits was consistent with the plan documents. App., *infra*, 63a-64a, 79a. The court rejected the contention that Empire misled respondents regarding their rights to benefits under the Plan. *Id.* at 64a-65a, 79a. The court explained, moreover, that Empire could not be liable as a fiduciary under ERISA because plan amendment is not a fiduciary function. *Id.* at 63a-64a n.2.

IV. Proceedings In The Court Of Appeals

The Second Circuit vacated the district court's decision in *Byrnes*, affirmed in part and reversed in part in *Alicea*, and remanded for further proceedings. App., *infra*, 1a-24a, 25a-46a. With respect to the vesting issue, the court of appeals rejected the district court's holding that the pre-1987 SPDs and the VSOP and VIP documents could not support respondents' claims to vested benefits. *Id.* at 9a-15a, 34a-36a. The court of appeals also rejected the district court's conclusion that Empire could not be held liable for breach of fiduciary duty. *Id.* at 18a-23a, 43a-46a.[5]

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[5] The court of appeals also rejected other aspects of the district court's decision with respect to respondents' promissory estoppel claims and, in *Byrnes*, respondents' claim that Empire unlawfully failed to provide requested plan information. App., *infra*, 16a-18a, 23a-24a, 41a-43a.

A. Contractual Vesting

The Second Circuit began its analysis of the vesting issue by holding that ERISA plan beneficiaries can avoid summary judgment on a claim that welfare plan benefits have "vested" merely by "point[ing] to written language capable of reasonably being interpreted as creating a promise on the part of [the employer] to vest . . . benefits." App., *infra*, 12a (second alteration in original, internal quotation marks, emphasis, and citations omitted). The court expressly rejected the contrary rule adopted by the Fifth Circuit in *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929 (5th Cir. 1993), which requires a vesting "promise that is 'clear and express[,]'" or "'precise language denying the right to withdraw benefits.'" App., *infra*, 11a (citing *Wise*, 986 F.2d at 937-38). Indeed, the court below emphasized that it had "rejected *Wise* twice before." App., *infra*, 12a. The Second Circuit accordingly adhered to its view that plaintiffs claiming vested welfare benefits can "get to a trier of fact based on ambiguous plan language." *Id.*

Applying its "ambiguous plan language" test, the Second Circuit held in *Byrnes* that certain statements in the pre-1987 SPDs were independently "capable of reasonably being interpreted" as promises to vest life insurance benefits. App., *infra*, 12a-15a. The court rejected Empire's reliance on the reservation-of-rights language in the 1987 SPD and the VSOP and VIP documents, reasoning that if respondents' life insurance benefits had vested under the earlier SPDs, they were not subject to the terms of later plan documents, even though respondents did not retire until after receiving the 1987 SPD. *Id.* at 14a, 14a n.6. The Second Circuit remanded *Byrnes* to the district court for "the ultimate determination of whether Empire promised [respondents] lifetime benefits" in the pre-1987 SPDs. *Id.* at 15a.

Respondents in *Alicea* did not rely on the pre-1987 plan documents, and accordingly the court of appeals in that case

entertained Empire's arguments regarding the reservation-of-rights language in the later Plan documents. The court agreed with Empire and the trial court that the 1987 SPD preserved for Empire the unqualified and unambiguous right to amend retiree life insurance benefits at its discretion. The court accordingly affirmed the district court's decision in Empire's favor with respect to those respondents who relied exclusively on the language in the 1987 SPD. App., *infra*, 36a-40a.[6] But with respect to the VSOP and VIP documents, the court found them to be ambiguous with respect to the vesting issue and accordingly remanded for the district court to resolve the perceived ambiguity. *Id.* at 34a-36a.

B. Breach Of Fiduciary Duty

The Second Circuit also set aside the district court's dismissal of respondents' claims for breach of fiduciary duty. App., *infra*, 18a-23a, 43a-46a. Empire argued that respondents' fiduciary duty claims fail under this Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489 (1996), which held that participants could bring individual breach of fiduciary duty actions under ERISA § 502(a)(3), but "that where Congress elsewhere provided adequate relief for a[n] . . . injury, there will likely be no need for further equitable relief" under § 502(a)(3). *Id.* at 515. Empire asserted, consistent with the decisions of other federal courts of appeals, that *Varity* precludes participants and beneficiaries from bringing individual breach of fiduciary duty claims under § 502(a)(3) when a claim for benefits can be asserted under § 502(a)(1)(B). The Second Circuit rejected this reading of *Varity*, holding that this Court "did not eliminate the possibility of a plaintiff successfully asserting a claim under both § 502(a)(1)(B), to en-

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[6] The court suggested, however, that those respondents might be able to file an amended complaint incorporating the vesting theory adopted by the *Byrnes* respondents based on the pre-1987 plan documents. App., *infra*, 40a-41a n.7.

force the terms of a plan, and § 502(a)(3) for breach of fiduciary duty." App., *infra*, 23a.

The Second Circuit also rejected the district court's holding that Empire was not acting as a fiduciary when it amended the plan to reduce respondents' life insurance benefits. App., *infra*, 19a-20a, 45a. Although the court conceded that amending a benefits plan is generally not a fiduciary function, it nonetheless held that Empire could be found to have violated ERISA's fiduciary provisions if its "decision to reduce benefits [constituted] a breach of a contractual promise to vest such benefits." *Id.* at 20a.

Finally, the Second Circuit overturned the district court's holding that Empire had no fiduciary obligation to disclose that the Plan's benefits were not vested. The court held that Empire's distribution of documents that "promised lifetime benefits but failed to note that Empire could reduce or terminate the[] benefits at any time" could give rise to liability for breach of fiduciary duty. App., *infra*, 21a.

REASONS FOR GRANTING THE WRIT

This Court has frequently recognized "the centrality of pension and welfare plans in the national economy, and their importance to the financial security of the Nation's work force." *Boggs v. Boggs*, 520 U.S. 833, 839 (1997). In enacting ERISA in 1974, Congress itself emphasized the pervasive significance of employee benefit plans to our nation's economy, noting that "the continued well being and security of millions of employees and their dependents are directly affected by these plans" and that ERISA plans "are affected with a national public interest." 29 U.S.C. § 1001(a). In recognition of the important role of ERISA plans and the compelling need for certainty and clarity in this heavily litigated area of the law, this Court has frequently granted review to resolve disputes over the proper interpretation of this comprehensive statute. *See, e.g., Great-West Life & Annuity Ins.*

Co. v. Knudson, 534 U.S. 204 (2002); *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001); *Harris Trust & Sav. Bank v. Salomon Smith Barney Inc.*, 530 U.S. 238 (2000); *Pegram v. Herdrich*, 530 U.S. 211 (2000); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432 (1999). This case presents another such opportunity and necessity, because the decisions below resolve questions of great significance for the administration of ERISA plans in a manner that conflicts with the decisions of numerous other federal courts of appeals.

The first question presented concerns the proper test for determining whether welfare benefits have "vested" and are therefore inalterable. The vesting rule adopted and adhered to by the court below conflicts with the rule applied in other circuits and undermines the intent of Congress in exempting welfare plans from ERISA's detailed vesting requirements. This issue is of fundamental importance to employers and to the proper functioning of ERISA's regulatory scheme, because the legal standard for determining whether welfare benefits have vested directly affects the extent to which employers will be permitted to adjust welfare plan benefits in response to changing economic and market conditions.

The second question presented involves a circuit conflict over the interpretation and effect of this Court's decision in *Varity Corp. v. Howe*, 516 U.S. 489 (1996). The Second Circuit held below that respondents were entitled to proceed against Empire on both their claim for breach of fiduciary duty under ERISA § 502(a)(3) and their claim for denial of benefits under ERISA § 502(a)(1)(B). Every other court of appeals to address the question has concluded, in keeping with this Court's reasoning in *Varity*, that § 502(a)(3) does not authorize a cause of action in these circumstances. In addition, the Second Circuit also departed from this Court's precedents and further exacerbated the conflicts among the lower courts by improperly expanding ERISA's definition of "fiduciary" and the scope of the fiduciary duties imposed by

ERISA. For the reasons set forth below, this Court should grant certiorari to resolve these important and intractable disagreements over critical issues of ERISA law.

I. Review Is Warranted To Resolve The Conflict Over The Proper Test For Determining Whether ERISA Welfare Plan Benefits Are "Vested"

A. The Courts Of Appeals Are Divided Over The Question Whether "Clear And Express" Vesting Language Is Required

Claims that ERISA welfare plan benefits have "vested" by virtue of ERISA plan language arise with great frequency in the federal courts. There exists a voluminous body of federal case law relating to the contractual vesting of welfare benefits, and the courts of appeals are solidly split regarding the legal standard that plaintiffs must satisfy to prevail in these cases. The Second Circuit below, adhering to and reaffirming its own precedent, held that a retiree can reach a trier of fact on a contractual vesting claim simply by pointing to ambiguous language that could be construed as a promise. While the Seventh, Eighth, and Eleventh Circuits take a similar approach to this issue, the Third, Fourth, Fifth, Sixth, and Tenth Circuits have adopted a contrary rule, and require "clear and express" vesting language before an ERISA welfare plan can be deemed to create any vested rights.

1. The Second Circuit's Approach

The court below allowed respondents to proceed with their claims for vested benefits on the ground that certain plan documents contained language capable of being interpreted to provide a vested lifetime life insurance benefit. App., *infra*, 15a, 35a. The court explained: "In this Circuit, to avoid summary judgment on an ERISA contractual vesting claim, plaintiffs need only identify 'specific written language that is reasonably susceptible to interpretation as a promise.'"

Id. at 34a (citing *Joyce v. Curtiss-Wright Corp.*, 171 F.3d 130, 134 (2d Cir. 1999)). "Our standard," the court noted, "permits a plaintiff to get to a trier of fact based on ambiguous plan language." App., *infra*, 12a. The court expressly declined to require "clear and express" vesting language, noting that it had "rejected [that standard] twice before." *Id.* Thus, under the Second Circuit's test, a plaintiff can prevail merely by pointing to ambiguous language and providing sufficient extrinsic evidence to persuade the trier of fact to construe the ambiguous language in his favor.

The Seventh Circuit concurs with the Second Circuit's position that clear vesting language is unnecessary. In *Rosetto v. Pabst Brewing Co.*, 217 F.3d 539 (7th Cir. 2000), for example, the Seventh Circuit held that a plaintiff is entitled to a trial on a claim for contractually vested welfare benefits so long as "there is language . . . [in the applicable plan documents] to suggest a grant of lifetime benefits, and the suggestion is not negated by the agreement read as a whole." *Id.* at 547. Similarly, in *Bidlack v. Wheelabrator Corp.*, 993 F.2d 603 (7th Cir. 1993) (en banc), the Seventh Circuit permitted retirees to proceed with a claim for vested welfare benefits based on ambiguous language. *Id.* at 605. The *Bidlack* plurality opinion rejected "the . . . position[] . . . that the contract must either use the word 'vest' or must state unequivocally that it is creating rights that will not expire." *Id.* at 607.[7]

The Eighth and Eleventh Circuits have likewise held that ambiguous vesting language can suffice to defeat summary judgment and create a factual question on the "vesting" issue.

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[7] Though *Bidlack* and *Rosetto* both involved collective bargaining agreements rather than unilaterally implemented benefit plan documents, the court in *Rosetto* held that the same standard governs both types of cases. *See Rosetto*, 217 F.3d at 544 ("The distinction between collective bargaining agreements and ERISA plans is not recognized in our cases, and we are not minded to embrace it now and make the law even more complicated than it is.").

See, e.g., Jensen v. Sipco, Inc., 38 F.3d 945, 950 (8th Cir. 1994) (finding for retirees where vesting language was "at most an ambiguous expression of an intent to vest retiree benefits"); *Stewart v. KHD Deutz of America, Corp.*, 980 F.2d 698, 702-03 (11th Cir. 1993) (holding that retirees could demonstrate a substantial likelihood of success on claim for vested health insurance benefits where language in the applicable collective bargaining agreement "could reasonably be interpreted to require [the employer] to provide benefits to qualifying employees throughout retirement").

2. The "Clear And Express Language" Test

In contrast to the foregoing decisions, other circuits have held that a claim to vested benefits cannot be supported by merely ambiguous plan language combined with extrinsic evidence; instead, clear and express language in the actual plan documents is required. These courts reason that because ERISA expressly exempts welfare benefits from its vesting provisions, an extra-statutory commitment to vest such benefits cannot be inferred absent a clear expression, in the applicable plan documents, of an intent to achieve that result.

The Fifth Circuit, for example, holds that an intent to vest welfare benefits "must be found in the plan documents and must be stated in clear and express language." *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929, 937 (5th Cir. 1993). Under this test, "[p]laintffs must assert strong prohibitory or granting language; mere silence is not of itself abrogation" of the employer's right to amend. *Id.* at 938. In *Wise*, retirees sued to recover allegedly vested health insurance benefits. The plan documents were "silent" on the issue of vesting, containing no clear expression of an intent on that issue. *Id.* at 932. The court held that welfare benefits could not vest in such circumstances, reasoning that "specific language establishing a vesting of health benefits" is required. *Id.* at 938.

The Sixth Circuit follows the same approach, requiring claimants to point to clear and express language in plan documents. In *Sengpiel v. B.F. Goodrich Co.*, 156 F.3d 660 (6th Cir. 1998), for example, the court rejected a contractual vesting claim because the applicable "plan documents . . . [did] not express a clear and affirmative intent to vest employees' welfare benefits." *Id.* at 667-68. *Accord Sprague v. Gen. Motors Corp.*, 133 F.3d 388, 400 (6th Cir. 1998) (en banc) ("[A]n employer's commitment to vest [welfare] benefits is not to be inferred lightly; the intent to vest 'must be . . . stated in clear and express language.'") (citing *Wise*, 986 F.2d at 937). *See also Voyk v. Bhd. of Locomotive Eng'rs*, 198 F.3d 599, 602 (6th Cir. 1999) (same).

Numerous other authorities, including decisions from the Third, Fourth and Tenth Circuits, are to the same effect. *See, e.g., UAW v. Skinner Engine Co.*, 188 F.3d 130, 139 (3d Cir. 1999) ("[T]o vest [welfare] benefits is to render them forever unalterable. Because vesting of welfare plan benefits constitutes an extra-ERISA commitment, an employer's commitment to vest such benefits is not to be inferred lightly and must be stated in clear and express language."); *Chiles v. Ceridian Corp.*, 95 F.3d 1505, 1513 (10th Cir. 1996) ("Contractual vesting of a welfare benefit is an extra-ERISA commitment that 'must be stated in clear and express language.'") (citing *Wise*, 986 F.2d at 937); *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 855 (4th Cir. 1994) ("Because . . . an obligation [to provide vested welfare benefits] constitutes an extra-ERISA commitment . . . courts may not lightly infer the existence of an agreement to vest employee welfare benefits. Rather, in recognition of ERISA's requirement that employee benefit plans be governed by written plan documents . . . any participant's right to a fixed level of lifetime benefits must be . . . stated in clear and express language.") (internal quotation marks and citations omitted). *See also Cinelli v. Sec. Pac. Corp.*, 61 F.3d 1437, 1441 (9th Cir. 1995) (citing *Wise* for clear and express language requirement).

As the foregoing discussion makes clear, there is a widespread circuit conflict over the question presented here. Indeed, the court below expressly acknowledged the "circuit split as to the summary judgment rules for contractual vesting," App., *infra*, 12a, and it also highlighted this conflict in previous decisions. *See American Fed'n of Grain Millers v. Int'l Multifoods Corp.*, 116 F.3d 976, 980 (2d Cir. 1997) ("[W]hen the documents are ambiguous as to whether retiree medical benefits are vested, the circuits disagree as to how the documents should be interpreted."). Other courts have similarly recognized the widespread division of authority on this issue. *See, e.g., Rosetto v. Pabst Brewing Co.*, 217 F.3d 539, 543 (7th Cir. 2000) ("Cases in other circuits are all over the lot .... Some insist that there be express language ...."). Given the widespread nature of the circuit conflict, and the absence of any reason to believe the conflict will resolve itself with time (as evidenced most recently by the Second Circuit's rejection of Empire's request that it reconsider this issue en banc), only review by this Court can resolve the disagreement among the lower federal courts.

3. The Circuits Are Also Divided Over The Issue Of Pre-Retirement Vesting

The court below also created a related circuit conflict by holding that the *Byrnes* respondents could base their vesting claim on the pre-1987 SPDs, even though those SPDs were superseded, prior to respondents' retirement, by the 1987 SPD which contained an express reservation-of-rights clause. App., *infra*, 12a-15a. The court construed the pre-1987 SPDs as potentially vesting lifetime life insurance benefits for all employees who were *eligible* for retirement at the time, even those employees (like respondents) who did not actually retire until after the revised SPD was distributed in 1987. *Id.* at 15a. The Second Circuit's conclusion that retiree welfare benefits can vest *before* an employee retires is inconsistent with the law in other courts of appeals, including the Fifth,

Sixth, and Eighth Circuits, which makes clear that a retiree's benefit entitlements are governed by the plan documents that are in effect at the time of his or her retirement.

The Fifth Circuit in *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929 (5th Cir. 1993), for example, held that the plaintiffs in that case were governed by the SPD that was issued a year prior to their retirement and contained a reservation-of-rights clause, not by the SPD that had issued previously and that did not contain such language. *Id.* at 938. The court explained: "The instant plaintiffs . . . are asking us to do what neither Congress nor any other court has ever done—impose vesting for employees who had not retired." *Id.* at 936. The Sixth and Eighth Circuits agree that retiree welfare benefits can vest at retirement, but not earlier. *See Maurer v. Joy Techs., Inc.*, 212 F.3d 907, 919 (6th Cir. 2000) (holding that collective bargaining agreements vested retirement benefits for individuals retiring before August 19, 1991, but finding that reservation-of-rights language inserted in an August 19, 1991, plan booklet was effective as to individuals retiring after that date); *Houghton v. Sipco, Inc.*, 38 F.3d 953, 957-58 (8th Cir. 1994) (rejecting plaintiffs' "theory . . . that their . . . benefits vested before they retired"). Review is warranted to resolve this conflict as well.

B. The Vesting Test Adopted By The Court Below Frustrates ERISA Policies And Leads To Harmful Results

Congress's decision to limit vesting requirements to the pension context reflects fundamental differences between the nature of pension and welfare plans. In a pension plan, either the benefit or the contribution is "defined," and thus employers can predict the costs of pension plans with near certainty over the long term. By contrast, the cost of providing employee welfare benefits (which include such benefits as health and disability insurance) is extremely unpredictable and fluctuates widely depending on developments in the

economy, the cost of medical treatments, the nature of the insurance products being made available by insurers, and a multitude of other factors. Employers simply cannot account for all of these factors ex ante when deciding what benefits to provide, and accordingly they must frequently change their welfare plan offerings in response to fluctuations in costs, insurance offerings, and the like.

As a result, "vesting" of welfare benefits all but defies practical implementation, and would pose a substantial threat to the financial well-being of countless employers. Consider, for example, how an employer today could continue to provide "vested" health insurance benefits to employees and/or retirees on the terms it was offering ten or fifteen years ago. With the massive shift to managed care that occurred over the past decade, the traditional form of indemnity insurance (which paid a stated percentage of virtually all medical costs) is simply not available in the marketplace at an affordable price, if at all. If employers could be bound to provide such welfare plan benefits on the terms offered decades ago, based on nothing more than "ambiguous" plan language drafted against the backdrop of ERISA's no-vesting rule, the consequences would be dramatic and disastrous.

Congress recognized these realities, which is precisely why it exempted welfare plans from ERISA's vesting requirements. *See* 29 U.S.C. § 1051(1). As this Court stated in *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73 (1995), "[e]mployers . . . are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans." *Id.* at 78. Congress granted employers the right to modify and terminate welfare plans at their discretion in order "to keep [] costs within reasonable limits [and to avoid] placing . . . a burden on employers [that] would inhibit the establishment of such plans." *Adams v. Avondale Indus., Inc.*, 905 F.2d 943, 947 (6th Cir. 1990) (internal quotation marks and citations omitted). As ERISA's legislative history

makes clear, "[t]o require the vesting of . . . ancillary benefits [such as medical and life insurance] would seriously complicate the administration and increase the cost of plans." H.R. REP. NO. 93-807, at 60 (1974), *reprinted in* 2 LEGISLATIVE HISTORY OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 (hereinafter "LEGISLATIVE HISTORY") at 3180 (1976). *See also* S. REP. NO. 93-383, at 51 (1973), *reprinted in* 1 LEGISLATIVE HISTORY 1119 (1976) (same).

The unduly lax "vesting" standard adopted by the court below and by the Seventh, Eighth, and Eleventh Circuits frustrates and undermines the congressional decision to reject vesting of welfare plan benefits. Given the realities and expense of modern civil litigation, the practical effect of the decisions below is to create a presumption that welfare benefits vest absent express language to the contrary—a presumption that countless ERISA welfare plans across the country will fail, having been drafted based on the (now apparently erroneous) assumption that there was no need to address the vesting issue expressly in view of the Congress's rejection of any vesting requirement. The effect of the rule adopted by the Second Circuit is thus in conflict with clear congressional intent regarding the administration of welfare plans. To the extent welfare benefits can be found to have vested despite the absence of any clear expression of employer intent to that effect in plan documents, employers run the very real risk that they will be saddled with unintended, long-term benefit obligations that they cannot afford or, in some instances, that can no longer even be satisfied with insurance products available in today's market.

Moreover, to the extent that clear and ambiguous vesting language is not required, courts will inevitably be looking outside the applicable plan documents for "extrinsic evidence" of intent. In this case, the Second Circuit expressly encouraged this result, holding that "the ultimate determination of whether Empire promised lifetime benefits should be

left to a trier of fact, likely assisted by extrinsic evidence to clarify the meaning of this ambiguous language." App., *infra*, 15a. *See also id.* at 36a ("we instruct the district court to allow the parties to present extrinsic evidence concerning the meaning of these ambiguous provisions"). This result is directly contrary to ERISA's policy of "plac[ing] great weight on the written terms of . . . formal plan documents," and undermines the "predictability as to an employer's future obligations" that Congress intended to provide when it included in ERISA a requirement that employee benefit plans be established and maintained pursuant to written documents filed with the Secretary of Labor. *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 857 (4th Cir. 1994) (internal quotation marks and citation omitted). *See also* 29 U.S.C. §§ 1024(a)(1), 1102(a)(1). In addition, companies often find it difficult to locate witnesses who can testify accurately regarding the employer's intent in drafting the plan documents years earlier, making it difficult for employers to prevail in contests that turn on the introduction of extrinsic evidence.

The effect of the existing conflict over the standard for contractual vesting is to hinge the substantial stakes of these cases on nothing other than the plaintiff's choice of judicial forum. Such inconsistent results are particularly troublesome given the frequent and recurring nature of this issue and the serious financial implications for all involved. The intolerable uncertainty and inconsistency in results engendered by this continuing circuit conflict demand this Court's review.

II. The Second Circuit's Erroneous Interpretation Of ERISA's Fiduciary Duty Provisions Conflicts With Numerous Decisions Of Other Courts of Appeals And Warrants Further Review

A. The Second Circuit's Decision To Permit Respondents To Proceed Under Both § 502(a)(3) And § 502(a)(1)(B) Is Irreconcilable With The Decisions Of Every Other Court Of Appeals To Consider The Question

The court below held that respondents could proceed with both their fiduciary duty claim under ERISA § 502(a)(3) *and* their denial of benefits claim under ERISA § 502(a)(1)(B). App., *infra*, 22a-23a, 44a-45a. Every other court of appeals to speak to this issue has held that ERISA does not permit a § 502(a)(3) breach of fiduciary duty claim to be brought if ERISA elsewhere provides a cause of action to seek redress for the same alleged injury.

In *Varity Corp. v. Howe*, 516 U.S. 489 (1996), this Court addressed the question whether "ERISA § 502(a)(3) authorize[s] ERISA plan beneficiaries to bring a lawsuit . . . that seeks relief for individual beneficiaries harmed by an administrator's breach of fiduciary obligations," and held that the words of § 502(a)(3)—which authorize "'appropriate equitable relief' to 'redress' any 'act or practice which violates any provision of this title'—are broad enough to cover individual relief for breach of a fiduciary obligation." *Id.* at 492, 510. This Court read § 502(a)(3) as a "'catch[-]all' provision[] [meant to] act as a safety net, offering appropriate equitable relief for injuries caused by violations that *§ 502 does not elsewhere adequately remedy.*" *Id.* at 512 (emphasis added).

Because § 502(a)(3) is only a "catch-all remedy," the *Varity* Court indicated that fiduciary duty claims under that provision would likely be unavailable when other avenues for seeking relief had been provided in ERISA. As the Court explained, "where Congress elsewhere provided adequate

relief for a beneficiary's injury there will likely be no need for further equitable relief." *Id.* at 515. The *Varity* plaintiffs were allowed to proceed under § 502(a)(3), however, because they had no ability to proceed under any of ERISA's other civil enforcement provisions. In particular, the plaintiffs in *Varity* "could not proceed under [§ 502(a)(1)] because they were no longer members of the . . . plan and, therefore, had no benefits due [them] under the terms of [the] plan." *Id.* (internal quotation marks and citation omitted).

In permitting respondents to proceed with their breach of fiduciary duty claims under § 502(a)(3) *and* their denial of benefits claim under § 502(a)(1)(B), the Second Circuit interpreted *Varity* as follows:

> The Supreme Court in *Varity Corp.* did not eliminate the possibility of a plaintiff successfully asserting a claim under both § 502(a)(1)(B), to enforce the terms of a plan, and § 502(a)(3) for breach of fiduciary duty . . . . *Varity Corp.* did not eliminate a private cause of action for breach of fiduciary duty when another potential remedy is available . . . .

App., *infra*, 23a. *See also Dunnigan v. Metro. Life Ins. Co.*, 277 F.3d 223, 231 (2d Cir. 2002) ("Because under § 502(a)(3)(B) we have determined that Dunnigan may recover the interest due her by reason of the Plan's unreasonable delay, if any, in paying her benefits, it makes no difference whether she also has the same entitlement under § 502(a)(1)(B)."). The court below was concerned that "should plaintiffs' claim under ERISA § 502(a)(1)(B) . . . to enforce their rights under the plan fail, plaintiffs' breach of fiduciary duty claim [would be] their only remaining remedy." App., *infra*, 22a.

The Second Circuit's holding in this regard is in direct conflict with the decisions of other circuits. The First, Fifth, Sixth, Eighth, Ninth, and Eleventh Circuits have each read *Varity* to mean that claimants *cannot* maintain a breach of

fiduciary duty claim under § 502(a)(3) when they can also pursue an alternative avenue for relief under § 502(a)(1)(B). *See LaRocca v. Borden, Inc.*, 276 F.3d 22, 28 (1st Cir. 2002) (following *Varity*, "federal courts have uniformly concluded that, if a plaintiff can pursue benefits under the plan pursuant to Section a(1), there is an adequate remedy under the plan which bars a further remedy under Section a(3)"). And this holds true irrespective of the merits of the underlying claim for denial of benefits.

In *Tolson v. Avondale Indus., Inc.*, 141 F.3d 604 (5th Cir. 1998), for example, the plaintiff brought suit under § 502(a)(1)(B) claiming that he was wrongfully denied certain disability and medical benefits under his employer's insurance plans, and also asserted a breach of fiduciary duty claim under § 502(a)(3) based on alleged misrepresentations made to him regarding the availability of those benefits. The Fifth Circuit affirmed the district court's judgment for Avondale on both claims. With respect to the plaintiff's breach of fiduciary duty claim, the court stated that the plaintiff's "efforts to justify assertion of breach of a fiduciary duty claim against the Plans by distinguishing such a claim from his claims for coverage and benefits claims [were] woefully unavailing." *Id.* at 610. Relying on this Court's decision in *Varity,* the Fifth Circuit held that "[b]ecause Tolson ha[d] adequate redress for disavowed claims through his right to bring suit pursuant to [§ 502(a)(1)], he ha[d] no claim for breach of fiduciary duty under [§ 502(a)(3)]." *Id.* Moreover, the court specifically rejected the argument (accepted by the Second Circuit here) that the ultimate invalidity of the § 502(a)(1) claim gave rise to a § 502(a)(3) fiduciary duty claim: "The simple fact that Tolson did not prevail on his claim under [§ 502(a)(1)] does not make his alternative claim under [§ 502(a)(3)] viable." *Id.*

Similarly, in *Katz v. Comprehensive Plan of Group Insurance*, 197 F.3d 1084 (11th Cir. 1999), the plaintiff as-

serted a denial of benefits claim under ERISA § 502(a)(1)(B) as well as a breach of fiduciary duty claim under § 502(a)(3). *Id.* at 1088. The district court dismissed the § 502(a)(3) claim on the grounds that the plaintiff had an adequate and similar remedy under § 502(a)(1)(B), but ultimately granted summary judgment for the defendant on the latter claim as well. *Id.* The Eleventh Circuit affirmed on all counts, explaining that at the time the order was entered dismissing the breach of fiduciary duty claims under § 502(a)(3) the plaintiff "had an adequate remedy under [§ 502(a)(1)(B)], a position which she was strenuously asserting in Count I of her complaint." *Id.* at 1089. And contrary to the Second Circuit's holding in the decisions below, the Eleventh Circuit was not persuaded by the fact that the plaintiff "did not prevail on the merits of that claim." *Id.* "[T]he availability of an adequate remedy under the law for *Varity* purposes," the court explained, "does not mean, nor does it guarantee, an adjudication in one's favor." *Id.*

Numerous other cases are to the same effect. *See, e.g., Rhorer v. Raytheon Eng'rs & Constructors, Inc.*, 181 F.3d 634, 639 (5th Cir. 1999) ("In *Varity* the Supreme Court observed that an ERISA plaintiff may bring a private action for breach of fiduciary duty only when no other remedy is available under [§ 502]."); *Bowles v. Reade*, 198 F.3d 752, 760 (9th Cir. 1999) ("[S]ince the Supreme Court's decision in *Varity*, we have denied plaintiffs individual relief under § 502(a)(3) where another section of ERISA already provided them with an adequate remedy."); *Conley v. Pitney Bowes*, 176 F.3d 1044, 1047 (8th Cir. 1999) ("Mr. Conley has a claim for benefits under [§ 502(a)(1)(B)] and therefore may not seek the same benefits in the form of equitable relief under [§ 502(a)(3)(B)]."); *Wilkins v. Baptist Healthcare Sys., Inc.*, 150 F.3d 609, 616 (6th Cir. 1998) ("The Supreme Court clearly limited the applicability of [§ 502(a)(3)] to beneficiaries who may not avail themselves of [§ 502]'s other remedies. . . .").

Thus, the Second Circuit has imposed a burden on Empire that it would not have to carry in any other jurisdiction—that of defending its plan amendment against allegations of a breach of fiduciary duty under ERISA § 502(a)(3). Nor is there any reason to believe that the Second Circuit will correct its erroneous position on this issue in a future case. The full Second Circuit was made aware of the aberrant nature of the decisions below by virtue of Empire's petition for rehearing en banc, yet the court declined to rehear these cases en banc. As noted above, moreover, the Second Circuit has already reaffirmed its view of the law in another case. *See Dunnigan*, 277 F.3d at 231. This Court's review is necessary to correct the Second Circuit's erroneous and unduly broad view of the availability of the § 502(a)(3) "catch-all" remedy.

B. The Decisions Below Conflict With Decisions Of This Court And Of Numerous Courts Of Appeals Regarding The Question Whether An Employer's Modification Of A Welfare Plan Is A Fiduciary Act

The court below held that amending a plan in a manner that interferes with vested benefits can constitute a fiduciary action, and that any employer that takes such an action can be held liable under ERISA's fiduciary duty provisions. App., *infra*, 19a-20a. That holding conflicts with decisions of this Court which categorically reject the notion that amendment, modification, or termination of an ERISA welfare plan constitutes a fiduciary act. Moreover, the court of appeals' proffered explanation for its holding—namely, that the plan amendment at issue in this case is allegedly invalid under ERISA as an attempt to eliminate "vested" benefits—is irreconcilable with decisions of other courts of appeals which make clear that an employer *never* acts in a fiduciary capacity when it changes plan benefits—irrespective of the ultimate validity of the change under ERISA.

This Court has squarely held that employers "who alter the terms of a plan do not fall into the category of fiduciaries." *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996); *accord Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995) ("'[A] company does not act in a fiduciary capacity when deciding to amend or terminate a welfare benefits plan'") (citation omitted). The *Spink* Court reasoned that when employers undertake to adopt, modify, or terminate welfare plans "they do not act as fiduciaries, but are analogous to the settlors of a trust." *Spink*, 517 U.S. at 890 (citations omitted). As the Court explained, "[t]his rule is rooted in the text of ERISA's definition of fiduciary," because the "'defined functions [of a fiduciary] do not include plan design,'" and thus "'an employer may decide to amend an employee benefit plan without being subject to fiduciary review.'" *Id.* (citation omitted).

Despite the clear and categorical nature of this Court's holding in *Spink*, the court below held that Empire's decision to amend the plan could be deemed a fiduciary act. App., *infra*, 19a-20a. The court conceded that "an employer that designs a retirement plan or amends an existing plan's design does not come within ERISA's definition of a fiduciary," *id.* at 20a (alteration, internal quotation marks and citation omitted), but announced a purported exception to that rule for amendments that impair vested benefits: "Empire's decision to reduce benefits may have been a breach of a contractual promise to vest such benefits. It therefore follows that Empire may have exercised discretionary authority with respect to the plan, and Empire's unilateral reduction in benefits . . . may have violated the plan documents and, in turn, ERISA § 404(a)(1)(D) [which imposes obligations on fiduciaries]." *Id.* at 20a.

The Fifth Circuit has also indicated its agreement with this approach. In *Izzarelli v. Rexene Prods. Co.*, 24 F.3d 1506 (5th Cir. 1994), the court stated:

> [A]n employer that decides to terminate, amend, or renegotiate a plan does not act as a fiduciary, and thus cannot violate its fiduciary duty, *provided that the benefits reduced or eliminated are not accrued or vested at the time, and that the amendment does not otherwise violate ERISA or the express terms of the plan.*

Id. at 1524 (emphasis eliminated and added). *Accord Hines v. Massachusetts Mut. Life Ins. Co.*, 43 F.3d 207, 210 (5th Cir. 1995).

By contrast, the Third, Sixth, and Seventh Circuits have taken the opposite approach, rejecting any attempts to extend ERISA's fiduciary duty rules to allegedly improper plan amendments *even when the challenged changes interfere with vested benefits* or are otherwise invalid or in violation of the terms of applicable plan documents. In *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155 (3d Cir. 1990), for example, the Third Circuit explained that an employer does not act in its fiduciary capacity simply by virtue of making an invalid plan amendment:

> If a purported amendment turns out to be invalid, then plaintiffs seeking anticipatory relief can have it declared void, and plaintiffs suing for benefits must have their claims evaluated under the terms of the relevant unamended plan. . . . [But] [i]n deciding to amend the plan [the employer] did not—indeed could not—have breached any fiduciary duties, because he simply was not acting as an ERISA fiduciary.

Id. at 1162. *See also, e.g., Jos. Schlitz Brewing Co. v. Milwaukee Brewery Workers' Pension Plan*, 3 F.3d 994, 1002 (7th Cir. 1993) (rejecting argument that selecting a method of determining withdrawal liability was a fiduciary function by virtue of the fact that it impacted vested benefits).

Similarly, in *Wulf v. Quantum Chemical Corp.*, 26 F.3d 1368 (6th Cir. 1994), the court held that the pension benefits at issue in that case were vested, and accordingly rejected the employer's attempt to apply a plan amendment that would reduce those benefits. *Id.* at 1378. Even in that context, however, the court made clear that the employer "was not acting as a fiduciary" in amending the plan. *Id.* at 1377. That conclusion, like the Third and Seventh Circuit decisions cited above, is irreconcilable with the reasoning of the court of appeals in this case.

The decisions below are not only inconsistent with precedents of this Court and the courts of appeals, but also with ERISA's functional definition of "fiduciary." As the Third Circuit has explained, "[f]iduciary duties under ERISA attach not just to particular persons, but to particular persons performing particular functions." *Hozier*, 908 F.2d at 1158. So, for example, an employer that is also a plan administrator is not necessarily acting in its fiduciary or administrator capacity at all times; when it acts in its capacity as employer, *i.e.*, when it performs functions other than those set forth in the Act's definition of "fiduciary," ERISA's fiduciary duty rules do not apply. *See, e.g., id.* ("[W]hen employers themselves serve as plan administrators, they assume fiduciary status only when and to the extent that they function in their capacity as plan administrators, not when they conduct business that is not regulated by ERISA.") (internal quotations omitted); *Spink*, 517 U.S. at 890.

The court below wholly disregarded ERISA's functional approach to fiduciary status, holding instead that the question whether the act of plan amendment constitutes a fiduciary act *depends on the permissibility of the amendment*. The language of ERISA simply does not permit this result, because the definition of fiduciary hinges on the function being performed, not the legality of the conduct at issue. *See* 29 U.S.C. § 1002(21)(A).

Moreover, the Second Circuit's approach is unworkable, because it precludes employers from knowing in advance whether a particular proposed plan amendment will be deemed a non-fiduciary act or will instead be judged against fiduciary standards (with the concomitant threat of liability for breach of fiduciary duty). As a consequence, employers are placed in an impossible Catch-22 situation, with no means of determining whether they must comply with fiduciary standards in making any particular plan amendment. Under the rule adopted below, that determination can be made only in hindsight, after years of litigating the validity of the amendment. The consequence of this uncertainty will inevitably be to discourage plan amendments and thus, "in effect, accord employees a vested right to welfare benefits, thereby upsetting ERISA's delicate balance in this area." *Adams v. Avondale Indus., Inc.*, 905 F.2d 943, 947 (6th Cir. 1990).

C. The Judgments Below Conflict With Decisions From Other Circuits Holding That ERISA Does Not Obligate Fiduciaries To Disclose The Non-Vested Nature Of Benefits In Plan Communications

In vacating the judgments for Empire on respondents' breach of fiduciary duty claims, the Second Circuit held that Empire may have violated its fiduciary duties "in its retiree letters and other communications which promised lifetime benefits but failed to note that Empire could reduce or terminate these benefits at any time." App., *infra*, 21a, 45a. The decisions below thus stand for the proposition that an ERISA plan fiduciary's failure to disclose the fact that welfare plan benefits are not vested can itself constitute a breach of fiduciary duty. That view of the law is directly contrary to the law in several other circuits.

In *Jensen v. Sipco, Inc.*, 38 F.3d 945 (8th Cir. 1994), for example, the Eighth Circuit expressly rejected the claim that an ERISA welfare plan administrator breached its fiduciary

duty by failing to disclose that welfare plan benefits are subject to change. The court held "that the failure to disclose that a welfare plan's benefits are not vested is neither a material misrepresentation nor a breach of the plan administrator's fiduciary duties." *Id.* at 952.

Similarly, in *Sprague v. General Motors Corp.*, 133 F.3d 388 (6th Cir. 1998) (en banc), the Sixth Circuit rejected a fiduciary duty claim where "GM's failure, if it may properly be called such, amounted to this: the company did not tell the early retirees at every possible opportunity that which it had told them many times before—namely, that the terms of the plan were subject to change." *Id.* at 405. The court explained that "[t]here is, in our view, a world of difference between . . . deliberate[ly] misleading . . . employees . . . and GM's failure to begin every communication to plan participants with a caveat." *Id.*

Several other courts of appeals have likewise rejected the possibility of fiduciary liability in these circumstances. *See UAW v. Skinner Engine Co.*, 188 F.3d 130, 151 (3d Cir. 1999) ("[T]he appellants have failed to persuade that Skinner was obligated under ERISA to inform its employees that retiree benefits may at some point in the future be modified or changed."); *Gable v. Sweetheart Cup Co.*, 35 F.3d 851, 858 (4th Cir. 1994) (rejecting argument that employer was estopped under ERISA from amending benefits because it had not previously "warn[ed] plan participants of any possibility of decrease in their benefits by including a specific modification clause in the SPD"); *Wise v. El Paso Natural Gas Co.*, 986 F.2d 929 (5th Cir. 1993) (rejecting claim that failing to include amendment/termination language in SPD prevented employer from amending benefits previously offered).

In addition to this conflict with decisions of several other circuits, the Second Circuit's holding also violates the text and structure of ERISA. Although Congress expressly mandated that vesting information be provided in *pension* plan

SPDs, it did *not* mandate the inclusion of such information in welfare plan SPDs. *See* 29 U.S.C. § 1022(b) (requiring such information only "for nonforfeitable pension benefits"). By imposing potential fiduciary liability on employer/administrators for failing to include disclaimers in their plan communications, the Second Circuit is in effect requiring employers to do what Congress chose not to require of them—include express language about vesting in their welfare plan documents. As the Sixth Circuit has noted, "[i]t would be strange indeed if ERISA's fiduciary standards could be used to imply a duty to disclose information that ERISA's detailed disclosure provisions do not require to be disclosed." *Sprague*, 133 F.3d at 405.

The Second Circuit's rule creates substantial uncertainty in this heretofore well-settled area of the law, by making it impossible for employers to understand the scope of their disclosure obligations in the welfare plan context. Because nothing in ERISA itself imposes any such disclosure obligation, employers have had no reason to comply with it, and accordingly the decision below opens the door to a vast new array of fiduciary breach lawsuits predicated upon similar failures to disclose the fact that welfare benefits do not vest. This Court's review is necessary to avoid subjecting countless employers to liability for conduct that is plainly consistent with any plausible reading of ERISA, and to eliminate the conflict and confusion created by the decisions below.

CONCLUSION

The petition for writs of certiorari should be granted.

Respectfully submitted.

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